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Criminal  
Court**

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No.: **ICC-02/11-01/11**

Date: **10 June 2013**

**PRE-TRIAL CHAMBER I**

**Before:** Judge Silvia Fernández de Gurmendi, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Christine Van den Wyngaert

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE**

***IN THE CASE OF THE PROSECUTOR v. LAURENT GBAGBO***

**Public document**

**Prosecution's application for leave to appeal the "Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute"**

**Source:** Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Detention Section**

**Victims Participation and Reparations  
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## Introduction

1. On 3 June 2013, the Majority of Pre-Trial Chamber I issued the “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute” (“Decision”).<sup>1</sup> The Presiding Judge appended a dissenting opinion (“Dissenting Opinion”).<sup>2</sup>
2. The Prosecution seeks leave to appeal the Decision on three fundamental legal issues that go to the heart of the scope of the confirmation of charges proceedings and the functions of the Pre-Trial Chamber under the Statute. These issues concern the proper interpretation of the standard of proof under Article 61(7), its application to the “facts and circumstances” of the case, and the powers of the Pre-Trial Chamber under the Statute to shape the factual basis of the charges. The Prosecution submits that the three issues arise from the Decision and meet the criteria for leave to appeal under Article 82(1)(d).

## Submissions

3. Pursuant to Article 82(1)(d), the Prosecution seeks leave to appeal the Decision on the following three issues:
  - (i) Whether the Decision correctly interpreted and applied the evidentiary standard under Article 61(7) (“First Issue”);
  - (ii) Whether in this case each “incident underlying the contextual elements” must be established to the standard of proof enshrined in Article 61(7) (“Second Issue”);

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<sup>1</sup> ICC-02/11-01/11-432.

<sup>2</sup> ICC-02/11-01/11-432-Anx-Corr-Anx.

- (iii) Whether the Pre-Trial Chamber has the power to order the Prosecution to amend the Document Containing the Charges (“DCC”)<sup>3</sup> by including additional facts (“Third Issue”).

**(a) The First Issue arises from the Decision**

4. The Decision correctly spells out the relevant evidentiary threshold pursuant to Article 61(7) consistent with prior jurisprudence on that matter,<sup>4</sup> but then departs from that jurisprudence when interpreting the law on the standard of proof and applying it to the facts of the case. In particular, the Decision requires that at the confirmation of charges stage the Prosecutor: (i) “largely complete her investigation”;<sup>5</sup> (ii) “present *all* her evidence”;<sup>6</sup> and (iii) “present[...] her strongest possible case”.<sup>7</sup> In addition, the Decision provides a detailed explanation of the Majority’s “general disposition towards certain types of evidence”.<sup>8</sup>
5. These findings undoubtedly have a direct impact on the evidentiary standard to be applied for the confirmation of charges. The requirements of a completed investigation and the presentation of all evidence, including the strongest evidence, as well as the general indication that some categories of evidence are preferred over others, necessarily raises the question of whether and how these findings can be reconciled with the following established principles: (i) that the evidentiary threshold for confirmation of charges is different and lower than that for conviction;<sup>9</sup> (ii) that confirmation proceedings have a limited scope and

<sup>3</sup> ICC-02/11-01/11-357-Conf-Anx1; a footnoted version of the DCC with references to the relevant evidence and e-Court links to the evidence was sent to the Chamber, the Defence and the legal representative of victims on 17 January 2013 at 18:20 hours. At the beginning of the confirmation of charges hearing, this document was registered as an HNE on the record of the case: ICC-02/11-01/11-421-Conf-Anx1. During its presentations at the confirmation of charges hearing, the Prosecution extensively used the footnoted DCC to refer to facts and evidence in support of its allegations.

<sup>4</sup> Decision, para.17.

<sup>5</sup> Decision, paras.25, 37.

<sup>6</sup> Decision, paras.37 (emphasis added).

<sup>7</sup> Decision, para.25.

<sup>8</sup> Decision, para.26; see also paras.27-34.

<sup>9</sup> Articles 61(7) and 66(3); see also ICC-01/04-01/06-568 OA3, para.56.

purpose and in particular are not a trial before the trial or a “mini trial”;<sup>10</sup> (iii) that the Pre-Trial Chamber’s powers are limited – it exercises a “gatekeeper function”, but does not rule on the guilt or innocence of an accused;<sup>11</sup> and (iv) that under Article 61(5), the Prosecution is allowed to rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.<sup>12</sup>

6. The fact that the issue of the correct interpretation and application of the standard of proof under Article 61(7) arises from the Decision is further evidenced by the Majority’s findings that “past jurisprudence, which predates [...] decisions of the Appeals Chamber, may have appeared more forgiving” in the application of the standard of proof.<sup>13</sup> This indicates the Majority’s belief that recent jurisprudence by the Appeals Chamber<sup>14</sup> has modified the interpretation of the standard of proof under Article 61(7) and requires a more stringent, or at least a “less forgiving” approach in its application.<sup>15</sup> Whether this conclusion is correct goes to the heart of the First Issue.
7. The Dissenting Opinion is further proof that the First Issue arises from the Decision. The Dissenting Judge specifically points out that in her view, the Decision adopts an “expansive interpretation of the applicable evidentiary standard at the confirmation of charges stage that exceeds what is required and indeed allowed by the Statute”.<sup>16</sup> According to her, “[i]t is [...] clear that both the quantum and the quality of the evidence received by the Pre-Trial Chamber may differ from the evidence that will be presented at trial”.<sup>17</sup> Whether these

<sup>10</sup> ICC-01/09-01/11-221, para.9; ICC-01/09-02/11-321, para.8; ICC-01/04-01/07-717, para.64; ICC-02/05-03/09-121-Corr-Red, para.31; ICC-01/04-01/06-803-tENG, para.37; ICC-02/05-02/09-243-Red, para.39; ICC-01/04-01/07-428-Corr, paras.5-6; ICC-01/04-01/07-2259 OA10, 12 July 2010, para.40.

<sup>11</sup> Decision, para.18; ICC-01/04-01/06-774 OA6, para. 47; ICC-01/04-01/07-475 OA, para. 68.

Compare further Article 61(7) (the decision making powers of the Pre-Trial Chamber) with Articles 66(3) and 74 (the decision making powers of the Trial Chamber).

<sup>12</sup> ICC-01/05-01/08-1386 OA5 OA6, para. 80; ICC-01/09-01/11-153, para.8.

<sup>13</sup> Decision, para.37.

<sup>14</sup> See Decision, footnote 51, referring to ICC-01/04-01/10-514 OA4, para.44; ICC-01/09-02/11-425, paras.33-36.

<sup>15</sup> See Dissenting Opinion, para.7.

<sup>16</sup> Dissenting Opinion, para.3.

<sup>17</sup> Dissenting Opinion, para.21.

characterisations of the Decision are correct is only a matter that the Appeals Chamber can decide. However, they are further evidence of the existence of an appealable issue arising from the Decision.

**(b) The Second Issue arises from the Decision**

8. The Majority correctly states that the evidentiary threshold under Article 61(7) applies to all “facts and circumstances” of the case and that accordingly it “is the same for all factual allegations, whether they pertain to the individual crimes charged, contextual elements of the crimes or the criminal responsibility of the suspect”.<sup>18</sup> However, the Majority then goes further to find that “*each incident underlying the contextual elements* must be proved to the same threshold that is applicable to all other facts”, namely that under Article 61(7).<sup>19</sup> It also rules that “the Prosecutor must establish the requisite threshold that a sufficient number of incidents relevant to the establishment of the alleged ‘attack’ took place”.<sup>20</sup> The Majority appears to view each “incident” as a constitutive part of the attack from which it can individually “determine whether the perpetrators acted pursuant to or in furtherance of a policy to attack a civilian population required by article 7(2)(a) of the Statute”.<sup>21</sup> As a result of the above, the Majority requests the Prosecution to consider providing, to the extent possible, further evidence or conducting further investigations, “[f]or each of the incidents allegedly constituting the attack against the ‘pro-Ouattara civilian population’”, among others.<sup>22</sup>
9. The Second Issue accordingly revolves around the definition of the scope of the “facts and circumstances described in the charges” that must be established to the requisite evidentiary threshold,<sup>23</sup> and in particular the proper distinction between “facts” and “evidence”. The Dissenting Opinion identifies this issue and

<sup>18</sup> Decision, paras.19-20.

<sup>19</sup> Decision, para.22 (emphasis added).

<sup>20</sup> Decision, para.23.

<sup>21</sup> Decision, para.36.

<sup>22</sup> Decision, para.44(4) (emphasis added).

<sup>23</sup> Decision, paras.19-20.

demonstrates how it arises from the Decision. According to the Dissenting Judge, the “facts and circumstances described in the charges’ do not refer to all facts that are contained in the narrative of the DCC or discussed in some way at the confirmation of charges hearing [and] must be distinguished from the facts which are not described in the charges, but from which the facts and circumstances of the charges can be inferred”.<sup>24</sup> While the Dissenting Judge is of the view that only the former must be established to the required evidentiary threshold,<sup>25</sup> the Majority ruled that “each incident” that the Prosecution relies on to establish the existence of the attack must be proved to the required standard under Article 61(7).<sup>26</sup>

10. In this case, the “charges” are set out in sections H and I of the DCC. They do not mention the 41 “incidents” referred to in the Decision.<sup>27</sup> In compliance with an order from the Pre-Trial Chamber, the Prosecution separated in its DCC the “material facts” from the “subsidiary facts”.<sup>28</sup> As a result, the “material facts” of the charges allege only that the crimes that the Prosecution seeks to attribute to Mr Gbagbo “were committed as part of a widespread and systematic attack by pro-GBAGBO forces directed against civilians perceived to support OUATTARA”.<sup>29</sup> With a view to establishing the existence of this attack, the Prosecution then referred in a different section of the DCC to “subsidiary facts” and evidence relating to “41 incidents”.<sup>30</sup> Whether each of these incidents must be established to the threshold of “substantial grounds to believe” is the subject of the Second Issue.

<sup>24</sup> Dissenting Opinion, paras.33-34.

<sup>25</sup> Dissenting Opinion, paras.37-39.

<sup>26</sup> Decision, paras.22-23, 36, 44(4).

<sup>27</sup> Decision, para.36.

<sup>28</sup> ICC-02-11-01/11-325, paras.27-28. The terms “material facts” and “subsidiary facts” are used in that decision. See also Dissenting Opinion, para.35. See further the explanation by the Prosecution of the structure of the DCC provided during the confirmation of charges hearing: ICC-02/11-01/11-T-14-ENG, p.31, lns.2-18.

<sup>29</sup> DCC, paras.97, 105.

<sup>30</sup> Footnotes 438 and 462 of the footnoted DCC, referring to paras.20-31; see also Decision, para.36.

11. The Second Issue also concerns the question whether the standard of proof under Article 61(7) exclusively applies to establishing the elements of the crimes (including the contextual elements and the mode of liability), and therefore to findings of fact that are indispensable to confirm the charges,<sup>31</sup> and if so, whether the 41 incidents can be properly included among these indispensable facts. If and when leave to appeal is granted, the Prosecution will argue that the facts pertaining to the 41 incidents were evidence offered to establish the existence of the attack and not material facts for the purposes of the charges. The Prosecution will further demonstrate that all the evidence related to these incidents must be viewed cumulatively and in the context of the entire record in order to determine whether there are substantial grounds to believe that there was an attack, as alleged by the Prosecution, without the need to enter findings on whether each of them has been established.

12. Finally, the Second Issue further relates to the question whether the term “incident” can be equated with the statutory notion of “acts” referred to in Articles 7(1) and 7(2)(a), and whether this has an impact on the applicable standard of proof to those incidents.<sup>32</sup>

**(c) The First and Second Issues meet the criteria for leave to appeal**

13. The First and the Second Issues are linked. They concern the correct interpretation and application of the standard of proof under Article 61(7) to the facts and circumstances of the case. Therefore, the Prosecution deals with the two Issues jointly when demonstrating that they meet the criteria for leave to appeal under Article 82(1)(d).

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<sup>31</sup> Both Trial Chamber I and Trial Chamber II have adopted this position in their respective Article 74 decision in relation to findings of guilt beyond reasonable doubt (see ICC-01/04-01/06-2842, para.92; ICC-01/04-02/12-3, para.35).

<sup>32</sup> See Dissenting Opinion, paras.42-45.



*i. The First and Second Issues significantly affect the fairness of the proceedings*

14. As repeatedly stated by Pre-Trial Chamber I when granting leave to appeal on similar issues, “[a]pplying an erroneous burden of proof can create a ‘direct and detrimental impact’ on correctly assessing the evidence”, and thus affect the fairness of the proceedings.<sup>33</sup> This alone suffices to satisfy this requirement for certification.
15. But the two Issues also affect the fairness of the proceedings *vis-a-vis* the Prosecution: since the Issues concern the interpretation and application of the standard of proof to the relevant facts of the case, the Prosecution’s opportunity<sup>34</sup> to offer additional evidence does not provide an adequate remedy since the Chamber will apply the same standard to any new evidence when deciding on whether to confirm the charges. The only way to remedy this error and provide fairness to the Prosecution is to allow the Appeals Chamber to enter an authoritative finding on the correct legal criteria for assessing evidence at the confirmation of charges stage.
16. The two Issues further affect the fairness of the proceedings because they interfere with the Prosecution’s ability to present its case.<sup>35</sup> If the standard of proof under Article 61(7) as interpreted and applied by the Majority establishes too high a threshold for confirmation, as expressed by the Dissenting Judge,<sup>36</sup> then it would be unfair to force the Prosecution to complete its investigation prior to the confirmation hearing, offer all its best evidence following the Majority’s “general disposition towards certain types of evidence”, and provide evidence that establishes substantial grounds to believe for each of the 41 incidents.

<sup>33</sup> ICC-02/05-01/09-21, p.7; ICC-01/04-01/10-487, para.11.

<sup>34</sup> See Article 61(8).

<sup>35</sup> ICC-02/04-01/05-90, 11 July 2006, para. 24.

<sup>36</sup> Dissenting Opinion, para.3.

17. Finally, the two Issues affect the fairness of the proceedings *vis-a-vis* the victims and witnesses.<sup>37</sup> First, if the Prosecution is forced to present all its best evidence, then it will need to call many live witnesses at the confirmation hearing. It will be forced to call even more live witnesses if each “incident” must individually be established to the evidentiary threshold under Article 61(7).<sup>38</sup> As a result, the risk to their safety and that of their families will unduly increase. Second, an incorrect evaluation of evidence that leads to the denial of confirmation also unfairly denies witnesses and victims a full hearing of the evidence, a judicial finding as to guilt or innocence, and the ability to seek reparations following the possible conviction of Mr Gbagbo.

ii. *The First and Second Issues significantly affect the expeditious conduct of the proceedings*

18. The two Issues affect the expeditious conduct of the proceedings by requiring further evidence to be led, and by delaying the decision on the confirmation of charges and the closure of the pre-trial phase of this case. In the *Bashir* case, Pre-Trial Chamber I held that the “production of further evidence in order to meet the standard espoused by the [Chamber] would affect the expeditiousness of the proceedings.”<sup>39</sup> In addition, in the *Mbarushimana* case, Pre-Trial Chamber I held that “the unnecessary evidence presentation [...] would affect the expeditiousness of the proceedings”.<sup>40</sup> The requirement to present all and its best evidence at the confirmation stage after having completed its investigation, together with the Majority’s “general disposition towards certain types of evidence”<sup>41</sup> effectively forces the Prosecution to calling many witnesses to testify *viva voce*, also in relation to each of the 41 “incidents”, or risk that the charges as a whole will not

<sup>37</sup> ICC-01/04-01/06-2463, para. 30.

<sup>38</sup> See Decision, para.47, where the Majority indicates that “upon receipt of all submissions and evidence of the parties and participants” it will decide “if there is a need to hear further oral submission or *viva voce* testimony of one or more witnesses”.

<sup>39</sup> ICC-02/05-01/09-21, p.8.

<sup>40</sup> ICC-01/04-01/10-487, para.12.

<sup>41</sup> Decision, para.26; see also paras.27-34.

be confirmed.<sup>42</sup> This would undoubtedly have a significant impact on the expeditious conduct of the continuation of the confirmation hearing in this case.

19. The two Issues further affect the expeditious conduct of the proceedings because even if this Chamber declines to confirm the charges against Mr Gbagbo after applying the incorrect evidentiary threshold under Article 61(7), the Prosecution is not precluded from subsequently making a new request for confirmation, if the request is supported by additional evidence.<sup>43</sup> Bearing in mind the importance of this case, the Prosecution will take this option into consideration.

iii. Immediate resolution of the First and Second Issues will materially advance the proceedings

20. Unless immediately resolved by the Appeals Chamber, the errors underlying the First and Second Issues will continue to affect the Chamber's evaluation of any supplemental evidence adduced by the Prosecution. This will necessarily affect the Prosecution's ability to satisfy its burden at the confirmation stage. Pre-Trial Chamber I in the *Mbarushimana* case found that having the Appeals Chamber rule on a similar issue concerning the interpretation and application of the relevant standard of proof "would assist the Chamber with any supplemental evidence presented against [the suspect] by the Prosecution." For that reason, the Chamber considered that "immediate resolution of this issue by the Appeals Chamber may materially advance the proceedings".<sup>44</sup> It further found that "Appeals Chamber intervention is also important to confirm that the present proceedings are properly concluded based on the standard of proof challenged by the

<sup>42</sup> The Prosecution notes that there is a tension between Chamber's findings that effectively force the Prosecution to rely on *viva voce* witnesses at the confirmation of charges hearing and its prior repeated rulings that it "expects that oral testimony at the hearing, if any, will be narrowly relied on and only to the extent that it cannot be properly substituted by documentary evidence or a written statement" (ICC-02/11-01/11-107, para.11; ICC-02/11-01/11-325, para.34). Other Pre-Trial Chambers have endorsed the same principle: see ICC-01/09-02/11-181, paras.8-9; ICC-01/09-01/11-221, paras.8-9.

<sup>43</sup> Article 61(8).

<sup>44</sup> ICC-01/04-01/10-487, para.14 ; see also para.26.

Prosecution”<sup>45</sup> and that the “appellate review [is justified where it] is the only way, short of additional evidence being presented, to ensure that the present proceedings should [...] advance at all”.<sup>46</sup>

21. In the *Bashir* case, Pre-Trial Chamber I further found that resolution of the correct standard for evaluating evidence at the arrest warrant stage would materially advance the proceedings “by providing clarity on the law on proof by inference, particularly at the arrest warrant stage”.<sup>47</sup> In this case, the evaluation of the correct standard at the confirmation stage would also materially advance the proceedings. It will ensure the correct assessment by the Chamber of evidence that has already been presented and any additional evidence that the Prosecution may submit.
22. Immediate resolution of the Issues is also required to clarify the specific jurisprudence of the Appeals Chamber that was heavily relied on for the purposes of the Majority’s findings on the applicable standard of proof (the *Mbarushimana* decision).<sup>48</sup> Not only the Dissenting Judge of this Chamber disagrees with the Majority’s interpretation of this jurisprudence,<sup>49</sup> but also a judge from another Chamber drew different conclusions from the same ruling.<sup>50</sup> Thus, enabling the Appeals Chamber to provide an authoritative definition of the scope and breadth of its ruling in the *Mbarushimana* case will not only ensure that these proceedings continue on a solid basis, but also provide clarity and legal certainty for proceedings before the Court as a whole. In this sense, it should be beyond dispute that there is a need to “[r]emov[e] doubts about the correctness of [the] decision.”<sup>51</sup>

<sup>45</sup> ICC-01/04-01/10-487, para.15.

<sup>46</sup> ICC-01/04-01/10-487, para.15.

<sup>47</sup> ICC-02/05-01/09-21, p. 8.

<sup>48</sup> Decision, footnote 51, referring to ICC-01/04-01/10-514 OA4, para.44.

<sup>49</sup> Dissenting Opinion, paras.8-16.

<sup>50</sup> ICC-01/09-02/11-728-Anx3-Corr2-Red, paras.86-100.

<sup>51</sup> ICC-01/04-168, paras.14-15, 18.

**(d) The Third Issue arises from the Decision**

23. The Third Issue, namely whether the Pre-Trial Chamber has the power to order the Prosecution to amend the DCC by including additional facts, also arises from the Decision. The Majority ordered the Prosecution to “submit a new Amended DCC setting out in detail and with precision the facts of the case, including all incidents forming the contextual elements of crimes against humanity”.<sup>52</sup> Regardless of whether the 41 incidents are an integral part of the contextual elements of the crimes charged in this case, the Third Issue concerns the question of whether a Pre-Trial Chamber has the power under the Statute to shape the factual allegations of the charges or to request the Prosecutor to reframe the charges in order to adapt them to the Chamber’s understanding of the case.<sup>53</sup> To borrow an expression of the Dissenting Judge, it is about the question of whether the Pre-Trial Chamber may “involve itself in the Prosecutor’s selection of which facts to charge”.<sup>54</sup>

**(e) The Third Issue meets the criteria for leave to appeal**

*i. The Third Issue significantly affects the fairness of the proceedings*

24. The Third Issue significantly affects the fairness of the proceedings because it relates to the distribution of powers between the Prosecution and the Chamber, as well as to their respective independence.<sup>55</sup> If this distribution is not respected, the proceedings are unfair, first and foremost in relation to the Prosecution, which is affected in the exercise of its statutory powers and in its ability to investigate and present what it believes is the case that can be properly established before

<sup>52</sup> Decision, para.45.

<sup>53</sup> Dissenting Opinion, para.50.

<sup>54</sup> Dissenting Opinion, para.51. If the Chamber believed that the 41 “incidents” referred to above were already among the “facts of the case”, it would not have instructed the Prosecution to amend the DCC in that respect. Even if this particular finding may appear to be contradictory with the Majority’s findings that the 41 incidents must all be established to the evidentiary threshold under Article 61(7). However, this does not matter for the purpose of the present application and the assessment whether the Third Issue arises from the Decision and meets the criteria for leave to appeal.

<sup>55</sup> ICC-01/04-01/06-2205 OA15 OA16, para.94.

Chambers of the Court. Under Article 54, the Prosecution has the duty and the power to investigate and Article 61(3)(a) states that the suspect must be provided with the document containing the charges “on which the Prosecutor intends to bring the person to trial”. If the Chamber involves itself in shaping the facts of the charges, this will unavoidably impact on the Prosecution’s case development, its investigation and protection plans, its litigation strategy and as a necessary consequence, its logistical and financial planning.

25. In addition, in the *Lubanga* case, Trial Chamber I held that an issue similar to the present one significantly affects the fairness of the proceedings because due to the Chamber’s involvement in the formulation of the charging document “the course of the trial may be significantly changed” and that involvement “is likely to have consequences as regards the evidence which it is considered necessary to put before the Chamber, as well as the time needed for future preparation by, and the resources of, the parties and participants.”<sup>56</sup>

ii. The Third Issue significantly affects the expeditious conduct of the proceedings

26. The Third Issue also significantly affects the expeditious conduct of the proceedings because “a pre-trial process that causes the investigatory or pre-trial phase to be unduly long or inefficient”<sup>57</sup> necessarily has that effect. Expanding the factual basis of the charges against a suspect has direct consequences in terms of the evidence which is considered necessary to prove the facts of the case; *inter alia*, it requires the Prosecution and the Defence to investigate these additional facts, to prepare their case in relation to them, to protect victims and witnesses, and to present the evidence in Court. It may also result in additional litigation, because the Prosecutor may not agree with the Chamber’s understanding of its case

<sup>56</sup> ICC-01/04-01/06-2107, para.29.

<sup>57</sup> *Prosecutor v Blagojevic et al.*, IT-02-60-PT, Decision on Accused Nikolic's Motion to Order the Prosecution to File Copies of All Witness Statements whom the Prosecution Intends to Call for Trial and Copies of all Exhibits the Prosecution Intends to Tender at Trial, 10 February 2003: [http://www.icty.org/x/cases/blagojevic\\_jokic/tdec/en/030210.pdf](http://www.icty.org/x/cases/blagojevic_jokic/tdec/en/030210.pdf).

hypothesis and the Defence may feel unfairly prejudiced by the inclusion of additional facts to which the suspect needs to respond, especially if this is done at the initiative of the Chamber.<sup>58</sup> Pre-Trial Chamber I in the *Katanga et al.* case has previously found that an issue that has “an impact on how the Prosecution goes about selecting its witnesses for the purpose of the confirmation hearing” affects the expeditious conduct of the proceedings.<sup>59</sup>

27. The Third Issue does not only affect the expeditious conduct of the pre-trial proceedings, but also the length of the trial. If charges in relation to the additional facts are confirmed, then the Prosecution must establish them beyond reasonable doubt at trial, which has the unavoidable above-mentioned consequences on its investigations and the presentation of the evidence.

28. In addition, Pre-Trial Chamber II has considered that one aspect of expeditiousness is if an issue “would entail the risk that lengthy and costly trial activities are nullified at a later stage.”<sup>60</sup> If the Pre-Trial Chamber in this case were to confirm the charges on facts and circumstances that the Prosecution included in the DCC on the instruction of the Chamber, the Trial Chamber could convict the accused on those charges. There is no doubt that that aspect of the Article 74 decision would be challenged on appeal, particularly since it would constitute a new development in the jurisprudence of the ICC.

*iii. The Third Issue affects the outcome of the trial*

29. The interpretation by the Majority of the Pre-Trial Chamber’s powers under the Statute permits the Chamber to consider, and possibly confirm charges against Mr Gbagbo that are based on facts and circumstances which are not currently part of the case. In the event that charges are confirmed, it effectively forces the

<sup>58</sup> ICC-01/04-01/06-1191, para.42.

<sup>59</sup> ICC-01/04-01/07-116, p. 6.

<sup>60</sup> ICC-02/04-01/05-20 (unsealed pursuant to ICC-02/04-01/05-52), para.36. The Prosecution notes that this can also be properly viewed as an element relevant to whether the immediate resolution of the issue will materially advance the proceedings – see e.g. ICC-01/04-168 OA3, para. 16.

Prosecution to bring before the Trial Chamber a significantly extended case. Accordingly, the Third Issue obviously also affects the outcome of the trial.

*iv. Immediate resolution of the Third Issue will materially advance the proceedings*

30. The Third Issue relates to a significant development in the practice of this Court affecting the division of powers between the Prosecution and the Pre-Trial Chambers. It raises the question whether the Decision is compatible with prior jurisprudence of the Appeals Chamber, which found that “[t]o give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute.”<sup>61</sup>

31. “[P]rompt reference of the issue to the court of appeal” and its “authoritative determination” will help the proceedings “‘move forward’ by ensuring that the proceedings follow the right course. Removing doubts about the correctness of a decision or mapping a course of action along the right lines provides a safety net for the integrity of proceedings.”<sup>62</sup>

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<sup>61</sup> ICC-01/04-01/06-2205 OA15 OA16, para.94.

<sup>62</sup> ICC-01/04-168, paras. 14-15, 18.



### Conclusion

32. For the reasons set out above, the Prosecution requests that the Trial Chamber grant leave to appeal the Decision on the three Issues identified in this application.



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Fatou Bensouda, Prosecutor

Dated this 10<sup>th</sup> day of June 2013

At The Hague, The Netherlands